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Human Rights Committee

Concluding observations on the fourth periodic report of the United States of America

Addendum

Information received from the United States of America on follow-up to the concluding observations*

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1. Although there remain matters regarding the interpretation or application of the Covenant on which the United States and members of the Committee are not in full agreement, in the spirit of cooperation the United States provides the following more recent information to address a number of the Committee's concerns, whether or not they bear directly on States Parties' obligations arising under the Covenant.

Paragraph 5

2. The Committee's follow-up requests focus on conduct during international operations in the context of armed conflict, and particularly detention and interrogation in the aftermath of the September 11 terrorist attacks. The United States reiterates its long-standing and fundamental disagreement with the Committee's view regarding the application of ICCPR obligations with respect to individuals located outside the territory of the United States.[1] However, in the spirit of cooperation, the United States has endeavored throughout the periodic reporting process to provide details on how the United States has conducted and will continue to conduct thorough and independent investigations of credible allegations of crimes committed during such international operations and of credible allegations of mistreatment of persons in its custody, as well as on final decisions regarding any prosecution of persons for such crimes when such disclosure is appropriate. We hope that the Committee is able to recognize that although the public disclosure of government information is often in the public interest, refraining from releasing information concerning specific individuals can also be appropriate, especially when privacy or other human rights interests counsel against disclosure.

3. In further response to the Committee's request in subparagraph (a), the United States reaffirms and continues to uphold the bedrock principle that torture and cruel, inhuman, or degrading treatment or punishment[2] are categorically and legally prohibited always and everywhere, violate U.S. and international law, and offend human dignity, and the United States has many protections against torture and cruel, inhuman, or degrading treatment or punishment. Torture is contrary to the founding principles of our country and to the universal values to which the United States holds itself and others in the international community. All U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo, are carried out in accordance with all applicable international and domestic laws. Paragraph 177 of our Fourth Periodic Report summarized Executive Order 13491, *Ensuring Lawful Interrogations*.[3] The National Defense Authorization Act for Fiscal Year 2016 ("2016 NDAA") codified many of the interrogation-related requirements included in the Executive Order, including requirements related to Army Field Manual 2-22.3.[4] It also imposed new legal requirements, including that the Army Field Manual remain publicly available, and that any revisions be made publicly available 30 days in advance of their taking effect.

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[1] The Committee is aware of the United States' position on the territorial scope of a State Party's obligations under the ICCPR, based on the ordinary meaning of Article 2(1), as discussed during the U.S. presentation at the Committee's 110th session and in previous exchanges and submissions. See also Observations of the United States of America on Human Rights Committee General Comment No. 31, Nature of the General Legal Obligations Imposed on States Parties to the Covenant, dated December 27, 2007, paragraphs 3-9 (hereinafter "U.S. Observations on General Comment No. 31"), available at http://2001-2009.state.gov/s/l/2007/112674.htm, and Observations of the United States of America on the Human Rights Committee's Draft General Comment No. 35, Article 9, June 10, 2014, *reprinted in* Digest of U.S. Practice in International Law 2014, p. 179, at paragraph 5, available at https://www.state.gov/documents/organization/244445.pdf.

[2] The United States' ratification of the ICCPR is subject, inter alia, to the following reservation: "[t]hat the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

[3] Executive Order 13491, *Ensuring Lawful Interrogations*, 74 FR 4893, Jan. 27, 2009, available at https://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1885.pdf.

[4] The Army Field Manual 2-22.3 is available at https://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/fm2_22x3.pdf.

4. In addition to the Army Field Manual, the U.S. Department of Defense has Department-wide policy directives in place to ensure humane treatment during intelligence interrogations and detention operations. For example, Department of Defense Directive 3115.09[5] requires that Department of Defense personnel and contractors promptly report any credible information regarding suspected or alleged violations of Department policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings, or tactical questioning. Reports must be promptly and thoroughly investigated by proper authorities, and remedied by disciplinary or administrative action, when appropriate. Additionally, Department of Defense Directive 2311.01E[6] requires that "[a]ll military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a Department of Defense Component shall report reportable incidents through their chain of command," including "[a] possible, suspected, or alleged violation of the law of war, for which there is credible information." All reportable incidents must be investigated and, where appropriate, remedied by corrective action.

5. U.S. law provides several avenues for the domestic prosecution of U.S. Government officials and contractors who commit torture and other serious crimes overseas. For example, 18 U.S.C. § 2340A makes it a crime to commit torture outside the United States.[7] Similarly, under the provisions of the Military Extraterritorial Jurisdiction Act (MEJA), persons employed by or accompanying the Armed Forces outside the United States may be prosecuted domestically if they commit a serious criminal offense overseas.[8] In addition, U.S. nationals who are not currently covered by MEJA are still subject to domestic prosecution for certain serious crimes committed overseas if the crime was committed within the special maritime and territorial jurisdiction of the United States — which includes, among others, U.S. diplomatic and military missions overseas and at Guantanamo Bay. As another example, the Uniform Code of Military Justice is available to punish members of the U.S. armed forces for violations of the law of war.

6. Regarding the conviction and sentencing of four former security guards for Blackwater USA that were previously reported in our October 9, 2015 reply (paragraph 3), the U.S. Court of Appeals for the District of Columbia Circuit overturned the conviction of Nicholas Abram Slatten on August 4, 2017, and ordered a new trial, finding that the trial court had abused its discretion in denying Slatten's motion to sever his trial from that of his three co-defendants. It also concluded that the imposition of a mandatory 30-year minimum sentence on the other three defendants violated the Eighth Amendment prohibition against cruel and unusual punishment and remanded their cases for resentencing.

7. The U.S. Government has investigated numerous allegations of torture or other mistreatment of detainees. For example, prior to August 2009, career prosecutors at the Department of Justice carefully reviewed cases involving alleged detainee abuse. These reviews led to charges in several cases and the conviction of a Central Intelligence Agency (CIA) contractor and a Department of Defense contractor.[9] And, as previously reported, in 2009, the U.S. Attorney General directed a preliminary review of the treatment of certain individuals alleged to have been mistreated while in U.S. Government custody subsequent to the September 11 attacks. The review considered all potentially applicable substantive criminal statutes as well as the statutes of limitations and jurisdictional provisions that

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[5] Department of Defense Directive 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, Nov. 15, 2013, http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/311509p.pdf.

[6] DoD Directive 2311.01E, DoD Law of War Program, May 9, 2006 ("DoD Directive 2311.01E"), available at http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101e.pdf.

[7] "Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life." 18 U.S.C. § 2340A(a).

[8] 18 U.S.C. ch. 212.

[9] See Fourth Periodic Report of the United States of America to the United Nations Human Rights Committee, paragraphs 533-534, and United States Written Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report (July 13, 2013), paragraphs 41 and 46, on these cases and others.

govern prosecutions under those statutes. That review of the alleged mistreatment of 101 individuals, led by a career federal prosecutor and now informally known as the Durham Review, generated two criminal investigations. The Department of Justice ultimately declined those cases for prosecution because the admissible evidence would not have been sufficient to obtain and sustain convictions. See United States' follow-up response dated March 31, 2015 (paragraph 5), and follow-up reply dated October 9, 2015 (paragraph 4). John Durham, the career prosecutor who led this extraordinarily thorough review, had access to all of the information that the Senate Select Committee on Intelligence (SSCI) reviewed when the Committee members wrote their full report, which included information about all of the detainees mentioned in the SSCI report. In addition, Mr. Durham and his team interviewed a substantial number of witnesses in the United States and abroad, and reviewed other evidence. Finally, before the SSCI report was released, Mr. Durham's team reviewed the Senate Select Committee's report as it existed in 2012 to determine if it contained any new information that would change his previous analysis, and determined that it did not.

8. In addition to the Department of Justice, and in further response to the Committee's subparagraph (a) request, there are many other accountability mechanisms in place throughout the U.S. Government aimed at investigating credible allegations of torture and prosecuting or punishing those responsible. For example, the CIA Inspector General conducted more than 25 investigations into misconduct regarding detainees after 9/11. The CIA also convened six high-level accountability proceedings from 2003 to 2012. These reviews evaluated the actions of approximately 30 individuals, around half of whom were held accountable through a variety of sanctions.

9. In addition, the U.S. military investigates credible allegations of misconduct by U.S. forces, and multiple accountability mechanisms are in place to ensure that personnel adhere to laws, policies, and procedures. The Department of Defense has conducted thousands of investigations since 2001 and it has prosecuted or disciplined hundreds of service members for misconduct, including mistreatment of detainees. Convictions can result in, among other punishments and consequences, punitive confinement, reduction in rank, forfeiture of pay or fines, punitive discharge, or reprimand. Individuals have been held accountable for misconduct related to the abuse of detainees by personnel within their commands. These individuals include senior officers, some of whom have been relieved of command, reduced in grade, or reprimanded.

10. The U.S. law, policy, and procedures that we have described in the preceding paragraphs apply to U.S. Government personnel, including persons in positions of command. Persons in positions of command are not exempt from the requirement to comply with the law, nor are they exempt from investigations based on allegations of wrongdoing. As noted above, it is sometimes not appropriate to highlight the cases of particular individuals.

11. In relation to the Committee's subparagraph (a) inquiry regarding judicial remedies available to detainees in U.S. custody at Guantanamo, the United States notes that all Guantanamo detainees have the ability to challenge the lawfulness of their detention in U.S. federal court through a petition for a writ of habeas corpus. Detainees have access to counsel and to appropriate evidence to mount such a challenge before an independent court. The United States has the burden in these cases to establish its legal authority to hold the detainees. Detainees whose habeas petitions have been denied or dismissed continue to have access to counsel pursuant to the same terms applicable during the pendency of proceedings. Additionally, in February 2014, the U.S. Court of Appeals for the D.C. Circuit held that detainees at Guantanamo can use a petition for a writ of habeas corpus to challenge certain "conditions of confinement" where such conditions would render that custody unlawful.[10]

12. In response to the Committee's subparagraph (b) inquiry regarding the responsibility of lawyers who provided legal advice for government actions following the 9/11 attacks, the United States reported in paragraph 13 of its response dated March 31, 2015, the final

[10] *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014).

decision of the Department of Justice (DOJ) on January 5, 2010, made by a career DOJ official with more than four decades of DOJ service, following an investigation conducted by the DOJ Office of Professional Responsibility into the "Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists."

13. With respect to the Committee's views and recommendation under subparagraph (c) concerning command responsibility, the United States notes its explanation provided in paragraph 12 of its follow-up response of March 31, 2015, regarding how the Uniform Code of Military Justice and other U.S. federal criminal law, as well as comparable state law, hold persons in the chain of command responsible for crimes committed by subordinates.

14. With respect to persons subject to the Uniform Code of Military Justice, the failure of persons in positions of command to take necessary and reasonable measures to ensure that their subordinates do not commit violations of international humanitarian law is made punishable through its punitive articles. For example, the Uniform Code of Military Justice makes punishable violations of orders, including orders to take necessary and reasonable measures to ensure that subordinates do not commit violations. The Uniform Code of Military Justice also makes punishable dereliction in the performance of duties, even if such dereliction was through neglect or culpable inefficiency.

15. Additionally, in some cases, the responsibility for offenses committed by a subordinate may be imputed directly to persons in positions of command. As noted in paragraph 12 of the U.S. response of March 31, 2015, Article 77 of the Uniform Code of Military Justice makes any person subject to the Uniform Code of Military Justice punishable as a principal, including any such person in position of command, who (1) aids, abets, counsels, commands, or procures the commission of an offense, or (2) causes an act to be done which, if done by that person directly, would be an offense. As a principal, the person is equally guilty of the underlying offense as the one who commits it directly and may be punished to the same extent.

16. With respect to the Committee's comment in subparagraph (d), the Committee previously acknowledged that the United States provided the declassified executive summary, totaling more than 500 pages, of the Senate Select Committee on Intelligence (SSCI) Report on the CIA's former Detention and Interrogation Program, which has been made available to the public, and also that the Durham investigation team reviewed a draft of the classified SSCI report in 2012 and did not find any new information that they had not previously considered during their investigation, as indicated in paragraph 4 of our reply dated October 9, 2015, and further confirmed in paragraph 8 above.

Paragraph 10

17. There have been no new developments to report regarding legislation related to requiring background checks for all private firearm transfers response to subparagraph (a) of the Committee's requests.

18. Federal agencies increased the number of active records available in the National Instant Criminal Background Check System Indices (NICS Indices) between December 31, 2015, and July 31, 2017, by 493,737 records — a six percent increase. States increased the number of active records they make available in the NICS Indices by nearly 35 percent between December 31, 2015, and July 31, 2017. The total number of active records in the NICS Indices increased by approximately 18 percent between December 31, 2015, and July 31, 2017. The Department of Justice has also provided incentives for schools to invest in safety and helped provide them with a model for how to develop emergency management plans.

19. Most recently, in response to an unacceptable level of gun violence that continues to plague the City of Chicago, the Attorney General outlined on June 30, 2017, the creation of the Chicago Gun Strike Force. The Crime Gun Strike Force is a permanent team of special agents, task force officers, intelligence research specialists, and Bureau of Alcohol,

Tobacco, Firearms and Explosives (ATF) Industry Operations investigators who are focused on the most violent offenders, in the areas of the city with the highest concentration of firearm violence. The Strike Force became operational June 1, 2017, and consists of 20 additional permanent ATF special agents, six intelligence specialists, 12 task force officers from the Chicago Police Department, two task force officers from the Illinois State Police, and four National Integrated Ballistics Information Network specialists. The Attorney General further announced the reallocation of federal prosecutors and prioritization of prosecutions to reduce gun violence, as well as further efforts working with law enforcement partners to stop the lawlessness.[11]

20. The United States wishes to clarify a misunderstanding of our earlier response regarding Stand Your Ground laws that is apparent from the Committee's request under paragraph (b). The review of Stand Your Ground provisions of state law, as previously reported, was not undertaken by the U.S. Government, but rather by the U.S. Commission on Civil Rights, which is an independent, bipartisan agency established by Congress to investigate, report, and make recommendations to the President and the Congress on civil rights matters. The information we reported regarding the focus of the Commission's independent review and the expectation of a final report was based on publicly available statements by participants in the Commission hearings. The United States has no role in or control over this independent undertaking. Also, our previous reports and responses, including paragraph 22 of our March 31, 2015 response, have made clear the respective roles of federal, state, and local governments and laws under our federal system of government, including criminal laws and rules governing self-defense. In our federal system, these laws are the province of state and local governments.

21. As a final note, the United States wishes to remind the Committee of the long-standing position of the United States regarding the scope of a State Party's ICCPR responsibility with respect to the private conduct of non-State actors, both in relation to gun violence and the exercise of self-defense, as noted in our response dated October 9, 2015, paragraph 10.[12] Likewise, the United States does not share the Committee's view as to the applicability of such concepts as "necessity" and "proportionality" in relation to assessing the use of force or self-defense for purposes of Articles 6 and 9 of the ICCPR. These concepts are derived from domestic and regional jurisprudence under other legal systems and are not broadly accepted as legally-binding internationally, nor supported by either the Covenant text or its *travaux preparatoires*.[13]

Paragraph 21

22. The United States continues to ensure that operations at the Guantanamo Bay detention facility are consistent with its international obligations.[14]

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[11] See Department of Justice Press Release dated June 30, 2017, available at https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-we-cannot-accept-these-levels-violence-chicago.

[12] See also the USG Observations on General Comment No. 31, supra note 1, paragraphs 10-18, and the USG Observations on Draft General Comment No. 35, supra note 1, paragraphs 10-18.

[13] See USG Observations on Draft General Comment No. 35, supra note 1, paragraphs 31 and 35, addressing the Committee's application of such concepts in relation to its interpretation of the term "arbitrary" under Article 9, as well as the discussion below in relation to Article 17.

[14] As previously observed in response to General Comment No. 31, supra note 1, paragraphs 24-27, and Draft General Comment No. 35, supra note 1, paragraphs 19-23, international humanitarian law (IHL) is the *lex specialis* with respect to the conduct of hostilities and the protection of war victims. Although the United States agrees as a general matter that armed conflict does not suspend or terminate a State's obligations under the Covenant within its scope of application, we do not believe that the Committee's recommendations with respect to law of war detentions and related operations accord sufficient weight to this well-established principle. As further stated in paragraph 24 of the United States' one-year follow-up report and previous submissions, the United States continues to have legal authority under the law of war to detain Guantanamo detainees while hostilities are ongoing.

23. In response to subparagraph (a) of the Committee's request, since our follow-up reply on October 9, 2015, 73 more detainees have been transferred from Guantanamo Bay, listed by date of announcement by the Department of Defense (DoD)[15] as follows: one Mauritanian to Mauritania (October 29, 2015); one U.K. national to the United Kingdom (October 30, 2015); five Yemenis to the United Arab Emirates (November 15, 2015); two Yemenis to Ghana (January 6, 2016); one Kuwaiti to Kuwait (January 8, 2016); one Saudi to Saudi Arabia (January 11, 2016); 10 Yemenis to Oman (January 14, 2016); one Egyptian to Bosnia Herzegovina (January 21, 2016); one Yemeni to Montenegro (January 21, 2016); two Libyans to Senegal (April 4, 2016); nine Yemenis to Saudi Arabia (April 16, 2016); one Yemeni to Montenegro (June 22, 2016); one Yemeni to Italy (July 10, 2016); one Yemeni and one Tajik to Serbia (July 11, 2016); 12 Yemenis and three Afghans to the United Arab Emirates (August 15, 2016); one Mauritanian to Mauritania (October 17, 2016); one Yemeni to Cape Verde (December 4, 2016); four Yemenis to Saudi Arabia (January 5, 2017); eight Yemenis and two Afghans to Oman (January 17, 2017); and one Saudi to Saudi Arabia and one Afghan, one Russian, and one Yemeni to the United Arab Emirates (January 19, 2017). There are currently 41 detainees held at Guantanamo.

24. Also, in response to the Committee's subparagraph (a) request, initial Periodic Review Board (PRB) hearings for each detainee at Guantanamo eligible for review were completed as of September 8, 2016. The final determinations for these hearings have been made public. The PRB determined that continued detention of 38 detainees was no longer necessary to protect against a continuing significant threat to the United States. Thirty-six of these detainees have been transferred from Guantanamo and two remain at Guantanamo. The PRB designated 26 detainees for continued law-of-war detention. These 26 detainees are subject to subsequent full reviews by the PRB on a triennial basis. They also receive file reviews every six months to determine whether any new information raises a significant question as to whether a detainee's continued detention is warranted. If such a significant question is raised, the detainee promptly receives another full review. The PRB is currently conducting file reviews for all eligible detainees and subsequent full reviews as warranted. Further information, including periodic updates on PRB hearings and determinations, is posted by the Periodic Review Secretariat at www.prs.mil/.

25. Of the 41 detainees who remain at Guantanamo, five detainees are currently approved for transfer; 10 detainees are currently facing charges, awaiting sentencing, or serving criminal sentences in the military commissions; and the remaining 26 detainees continue to be eligible for review by the PRB.

26. In response to the Committee's subparagraph (b) request concerning the status of military commission prosecutions, proceedings are currently pending before military commissions against Khalid Sheikh Mohammed and four other alleged co-conspirators accused of planning the September 11 attacks, as well as against Abd Al-Rahim Hussein Muhammed Abdu Al-Nashiri for his alleged role in the 2000 attack on the USS Cole, and Abd Al Hadi Al-Iraqi for conspiring with and leading others in attacks on U.S. and coalition service members in Afghanistan, Pakistan, and elsewhere from 2001 to 2006.[16] Several individuals have been convicted through military commission proceedings (either through trial or guilty pleas) and are awaiting sentencing, serving sentences, or have completed their sentences. One conviction was vacated on appeal to the U.S. Court of Appeals for the D.C. Circuit after the defendant had been released;[17] another conviction has recently been upheld by the D.C. Circuit and is now being considered for review by the U.S.

[15] Department of Defense news releases are available at https://www.defense.gov/News/News-Releases/

[16] Unlike the alleged plotters of the September 11 attacks and Al-Nashiri, the charges against Al-Iraqi were referred to a military commission not authorized to issue a capital sentence.

[17] *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012), *overruled in part, Al Bahlul v. United States*, 767 F.3d 1, 11-17 (D.C. Cir. 2014) (en banc).

Supreme Court;[18] and appeals in two cases are pending before the U.S. Court of Military Commission Review.[19]

27. In further response to the Committee's subparagraph (b) and (c) observations and recommendations, the United States has explained the legal grounds for detentions at the Guantanamo Bay detention facility and disagrees with the premise of the Committee's recommendation and follow-up requests that prosecution or immediate release of detainees is required.[20] As addressed in our Fourth Periodic Report and subsequent follow-up responses, the United States has authority under the 2001 Authorization for Use of Military Force (2001 AUMF), as informed by the laws of war, to detain individuals who were part of, or substantially supported, the Taliban, al Qaeda, or associated forces that are engaged in hostilities against the United States or its coalition partners. The U.S. Supreme Court has recognized that the capture and detention of enemy belligerents in order to prevent their return to the battlefield has long been recognized as an "important incident[] of war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (internal quotations omitted), and the United States' authority to detain under the 2001 AUMF has been upheld by U.S. federal courts in habeas corpus proceedings. Accordingly, the United States continues to base its domestic legal authority to detain the individuals held at Guantanamo Bay on the 2001 AUMF, as informed by the laws of war.[21]

Paragraph 22

28. The United States has provided information on how the U.S. Constitution and domestic laws ensure the protection of the law against arbitrary and unlawful interference with privacy in conformity with its obligations under Article 17. These protections apply to any person located within United States territory in the conduct of surveillance activities, whether at the federal or state level and regardless of purpose or context. In response to the Committee's subparagraph (a), (b), and (f) assessments, and as previously stated, the United States fundamentally disagrees with Committee's view regarding the application of ICCPR obligations with respect to individuals located outside the territory of the United States.

29. The United States also disagrees with the Committee's view regarding the applicability of such concepts as "necessity" and "proportionality" in relation to interpreting the meaning of either "lawful" or "arbitrary" in the context of Article 17 of the ICCPR.[22] As we have previously responded, these concepts are derived from domestic and regional jurisprudence under other legal systems, are not broadly accepted internationally, go beyond what is required by the ICCPR, and are not supported by either the text of Article 17 or the Covenant's *travaux préparatoires*. In further response to the Committee's subparagraph (a) request, legal provisions governing access to personal data in the United States, whether for criminal justice or national security purposes, are clear and comprehensive. They adhere to the fundamental guarantee in the Fourth Amendment to the U.S. Constitution, which provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

[18] *Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam). As of this writing, Bahlul has petitioned the Supreme Court for review.

[19] See *In re Khadr*, 823 F.3d 92 (D.C. Cir. 2016) (denying petition for writ of mandamus to the U.S. Court of Military Commission Review).

[20] Also as stated in paragraph 30 of its one-year follow-up report and previously, all current military commission proceedings incorporate fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 and other applicable law, and are further consistent with those in Additional Protocol II of the 1949 Geneva Conventions.

[21] *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.").

[22] See paragraph 33 of the United States' one-year follow-up response dated March 31, 2015, see also paragraph 18 and footnote 19 of the United States' Reply to the Special Rapporteur for Follow-up dated October 9, 2015.

be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Although the Fourth Amendment generally does not apply to searches of non-U.S. persons located abroad,[23] it does typically govern searches of non-U.S. persons and their property if they are located in the United States,[24] including searches through electronic surveillance.[25]

30. The United States has also provided information on Presidential Policy Directive 28, Signals Intelligence Activities (PPD-28), which applies important protections to personal information regardless of nationality. The scope of these protections includes signals intelligence activities conducted outside the United States. With respect to subparagraph (a)-(b), the Committee appears, from its earlier follow-up questions, to have the impression that PPD-28's safeguards are "administrative measures."[26] To be clear, in the United States, "[a] presidential directive has the same substantive legal effect as an executive order,"[27] which has the full force and effect of law. In addition, presidential directives, like executive orders, "remain effective upon a change in administration."[28] Thus, as applied to the Executive Branch generally and to intelligence agencies conducting signals intelligence activities specifically, the measures required by PPD-28 have the force of law, and remain in effect.

31. As discussed more fully in previous submissions, the Foreign Intelligence Surveillance Act ("FISA") governs, among other things, electronic surveillance, physical search, and access to personal data for foreign intelligence in the United States. FISA was first enacted in 1978, and it "embodie[d] a legislative judgment that court orders and other procedural safeguards are necessary to [e]nsure that electronic surveillance by the U.S. Government within this country conforms to the fundamental principles of the Fourth Amendment."[29] All parts of the statute (including all subsequent amendments) are public and are contained within Title 50 of the U.S. Code.[30] Section 702 of FISA authorizes the acquisition of foreign intelligence information through targeting of non-U.S. persons located outside the United States, with the compelled assistance of U.S. electronic communications service providers.[31] It contains extensive legal constraints, oversight requirements, and other privacy safeguards. Multiple layers of oversight by all three branches of government ensure that this activity is carefully undertaken in strict compliance with legal requirements. As the Privacy and Civil Liberties Oversight Board (PCLOB) found, Section 702 collection targets specific persons about whom an individualized determination has been made that the person is likely to use a selector (e.g., email address or phone number) to communicate a category of foreign intelligence information approved by the Foreign Intelligence Surveillance Court (FISC). Such collection is not "mass surveillance" or "bulk collection."[32] Recently, partly in response to a report by its Inspector General, the National Security Agency (NSA) reported compliance issues to the FISC regarding so-called "upstream" collection. This resulted in modifications to the Section 702 targeting procedures and minimization procedures that narrow the communications the NSA collects under Section 702. The government has released a great deal of information

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[23] See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

[24] See *id.* at 278 (Kennedy, J., concurring).

[25] See generally *Katz v. United States*, 389 U.S. 347 (1967).

[26] See Deputy Special Rapporteur's letter following the Committee's 114th session in July 2015 at p. 2.

[27] *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order* [OLC opinion January 29, 2000], available at https://www.justice.gov/sites/default/files/olc/opinions/2000/01/31/op-olc-v024-p0029_0.pdf.

[28] *Id.*

[29] *United States v. Duggan*, 743 F.2d 59, 73 (2d Cir. 1984) (quoting Senate Report No. 95-701, at 13 (1978)).

[30] See 50 U.S.C. §§ 1801, et seq.

[31] Large amounts of information about the operation and oversight of Section 702 is publicly available. Numerous court filings, judicial decisions, and oversight reports relating to the program have been declassified and released on the ODNI's public disclosure website, www.icontherecord.tumblr.com. Moreover, Section 702 was comprehensively analyzed by the PCLOB, in a report which is available at https://www.pclob.gov/library/702-Report.pdf.

[32] https://www.pclob.gov/library/702-Report.pdf.

regarding this change, including an explanatory statement from the NSA, the revised targeting and minimization procedures approved by the FISC, and the FISC opinion addressing the change.[33]

32. In further response to the Committee's requests under subparagraphs (a), (b), and (c) regarding the implementation, application, and effectiveness of the USA FREEDOM Act of 2015 (the Act) in ensuring the protection of the law against arbitrary and unlawful interference with privacy, we note that the Act was enacted in June 2015, and contains a number of provisions that modify U.S. surveillance authorities and other national security authorities through legislation, and increase transparency regarding the use of these authorities described in our October 2015 reply to the Committee.[34] As described in that reply, the Act prohibits bulk collection by the U.S. Government under Title V of FISA (also referred to as Section 215), the FISA pen register and trap and trace provision, and through the use of National Security Letters. In addition, the Act replaces the NSA bulk telephony metadata program under FISA with a new mechanism, under which the U.S. Government may only make targeted requests for telephone records held by communication service providers pursuant to individual orders from the FISC, rather than requesting such records in bulk. In furtherance of transparency, the government has released a report by NSA's Civil Liberties and Privacy Office that describes in detail how it is implementing the Act.[35] NSA's minimization procedures that apply to records obtained under the Act have also been released.[36]

33. One particular element of increased transparency is the Act's codification and expansion of a previously existing policy commitment to report publicly certain statistics concerning the use of critical national security authorities, including FISA, in an annual report called the *Statistical Transparency Report Regarding Use of National Security Authorities (Annual Report)*.[37] The Fourth Annual Report, covering calendar year 2016, was published in April 2017 and, where these statistics are available, provides a compendium of four years' worth of informative data concerning the exercise of FISA authorities, both before and as amended by the Act. This includes Title IV and Title V authorities to obtain data from third parties upon the issuance of an individualized order by the FISC.

34. The Act also provides that recipients of certain national security orders and directives may publish statistical information regarding the number of orders and directives received under particular categories.[38] To protect intelligence sources and methods, these numbers must be published in numerical ranges. The public can view such reports by visiting web pages set up by service providers to make such statistical information available.

35. Another transparency mandate under the Act is the requirement that the Director of National Intelligence (DNI), in consultation with the Attorney General, conduct a declassification review of each decision, order, or opinion issued by the FISC and the Foreign Intelligence Court of Review (FISC-R) that includes a significant construction or interpretation of any provision of law, and to make publicly available to the greatest extent practicable any such decision, order, or opinion.[39] Where declassification is not possible for national security reasons (the Act provides for a formal waiver process), then an

[33] Links to these documents are available at https://icontherecord.tumblr.com/post/160561655023/release-of-the-fisc-opinion-approving-the-2016

[34] See paragraphs 20-24 of the United States' response dated October 9, 2015.

[35] Transparency Report: The USA FREEDOM Act Business Records FISA Implementation (Jan. 15, 2016), available at https://www.nsa.gov/about/civil-liberties/reports/assets/files/UFA_Civil_Liberties_and_Privacy_Report.pdf

[36] https://www.nsa.gov/about/civil-liberties/reports/assets/files/UFA_SMPs_Nov_2015.pdf

[37] See paragraph 37 of the United States' one-year follow-up response dated March 31, 2015, referencing the first Annual Report, issued in June of 2014. All Annual Reports are publicly available at https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2016

[38] 50 U.S.C. § 1874

[39] 50 U.S.C. § 1872

unclassified summary must be prepared. Several FISA opinions, orders, and related court documentation have already been publicly released.[40]

36. The Act also provides for the designation of amici curiae from a panel of not fewer than five individuals jointly established by the FISC and FISC-R. The court is to designate an amicus curiae to assist the FISC in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate.[41] It may also designate an amicus curiae to provide technical assistance and in any instance where the court deems appropriate. An amicus curiae designated to assist the court is to provide, as appropriate, legal arguments that advance the protection of individual privacy and civil liberties; information related to intelligence collection or information technology; or legal arguments or information regarding any other area relevant to the issue presented to the court. The FISC has published a list of individuals authorized to appear as amici curiae,[42] and has already made several appointments in specific cases.[43]

37. In subparagraph (d), the Committee observed and recommended that the United States refrain from imposing mandatory data retention requirements on third parties. The United States has taken this recommendation under consideration and wishes to inform the Committee that it respectfully declines its adoption. Such data retention requirements, where applicable, are exercised pursuant to U.S. law consistent with our obligations under Article 17.

38. With respect to the Committee's request under subparagraph (e) for information on access to remedies, to supplement previous responses, U.S. law provides a number of avenues of redress for individuals who have been the subject of unlawful electronic surveillance for foreign intelligence purposes. Under FISA, an individual who can establish standing to bring suit would have remedies to challenge unlawful electronic surveillance under FISA. For example, FISA allows persons subjected to unlawful electronic surveillance to sue U.S. Government officials in their personal capacities for money damages, including punitive damages and attorney's fees.[44] Such individuals could also pursue a civil cause of action for money damages, including litigation costs, against the United States when information about them obtained in electronic surveillance under FISA has been unlawfully and willfully used or disclosed.[45] In the event the government intends to use or disclose any information obtained or derived from electronic surveillance of any aggrieved person under FISA against that person in a judicial or administrative proceeding in the United States, it must provide advance notice of its intent to the tribunal and the person, who may then challenge the legality of the surveillance and seek to suppress the information.[46] Finally, FISA also provides criminal penalties for individuals who intentionally engage in unlawful electronic surveillance under color of law or who intentionally use or disclose information obtained by unlawful surveillance.[47]

39. In addition to avenues for redress under FISA, the Computer Fraud and Abuse Act prohibits intentional unauthorized access (or exceeding authorized access) to obtain information from a financial institution, a U.S. Government computer system, or a computer accessed via the Internet, as well as threats to damage protected computers for purposes of extortion or fraud. Any person who suffers damage or loss by reason of a violation of this law may sue the violator (including a government official) for compensatory damages and injunctive relief or other equitable relief regardless of whether

[40] See, *e.g.*, https://icontherecord.tumblr.com/post/143070924983/release-of-three-opinions-issued-by-the-foreign.

[41] 50 U.S.C. § 1803(i).

[42] http://www.fisc.uscourts.gov/amici-curiae.

[43] For example, this publicly released case involved an amicus curiae, who made legal arguments to advance the protection of individual privacy and civil liberties: https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf.

[44] 50 U.S.C. § 1810.

[45] 18 U.S.C. § 2712.

[46] 50 U.S.C. § 1806.

[47] 50 U.S.C. § 1809.

a criminal prosecution has been pursued, provided the conduct involves at least one of several circumstances set forth in the statute.[48]

40. Title I of the Electronic Communications Privacy Act (ECPA), also known as the Wiretap Act, is the principal statute regulating the domestic interception of wire, oral, and electronic communications.[49] Title II of ECPA, also known as the Stored Communications Act, regulates the government's access to stored electronic communications, transactional records, and subscriber information held by third-party communication providers.[50] Both the Wiretap Act and the Stored Communications Act allow, under certain circumstances, any person who suffers damage or loss by reason of a violation of either law to sue a violator for compensatory damages, injunctive relief, and reasonable attorney's fees.[51] Additionally, any person who is aggrieved by any willful violation of the Wiretap Act or the Stored Communications Act may commence an action against the United States to recover money damages.[52]

41. Additionally, individuals have sought, and in some cases have obtained, judicial redress for allegedly unlawful government access to personal data through civil actions under the Administrative Procedure Act (APA), a statute that allows persons "suffering legal wrong because of" certain government conduct to seek a court order enjoining that conduct.[53] For example, a recent challenge under the APA resulted in a decision by a federal appeals court holding both that bulk collection of telephone metadata under Title V of FISA could be challenged as exceeding, and did in fact exceed, the U.S. Government's authority under the statute.[54] That bulk telephone metadata collection program was terminated in the USA FREEDOM Act of 2015, as discussed above.

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[48] 18 U.S.C. § 1030.

[49] 18 U.S.C. §§ 2510-2522.

[50] 18 U.S.C. §§ 2701-2712.

[51] See 18 U.S.C. §§ 2520, 2707.

[52] 18 U.S.C. § 2712.

[53] 5 U.S.C. § 702.

[54] *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015). Other courts, agreeing with the U.S. Government, have reached contrary rulings on both points. See *Klayman v. Obama*, 957 F. Supp. 2d 1, 19-25 (D.D.C. 2013) (finding that plaintiffs could not bring suit under the APA alleging violations of the statute, but could bring suit alleging violations of the Fourth Amendment), *vacated*, 800 F.3d 559 (D.C. Cir. 2015); *In re Application of the FBI*, No. BR 13-109, 2013 WL 5741573, at *3-9 (FISC Aug. 29, 2013) (holding that the program was consistent with the statute).